BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARCY LYNNE MILLS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,685
WHEATLANDS HEALTH CARE CENTER	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOC. OF HOMES FOR THE AGING INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Claimant appealed the November 24, 2010, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board (Board) heard oral argument on April 15, 2011.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for claimant. Michael L. Entz, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the November 24, 2010, Award, ALJ Clark denied claimant's request for benefits after determining that although claimant "may" have suffered personal injury by accident arising out and in the course of her employment on August 2, 2009, she did not sustain her burden of proving that she has any kind of permanent or functional impairment. The Award does not specifically deny past authorized medical compensation paid by respondent nor does it order respondent to pay past medical expenses incurred

by claimant. Stipulation #9 in the Award states "[m]edical has been paid totaling $9,825.47."[1] There is no mention of unauthorized expenses, but the Award states "Claimant's request for benefits, including future medical benefits, is hereby denied."[2] As such, it is not clear whether the ALJ found the claim to be compensable or not.

Claimant contends she has sustained her burden of proof that she suffered personal injury by accident arising out of and in the course of employment. Additionally, claimant argues she has proven she sustained a whole body functional impairment and her entitlement to a work disability.[3]

Respondent contends the Award should be affirmed and the Board should find that claimant failed to present credible evidence that personal injury by accident ever occurred. Further, respondent maintains claimant failed to prove permanent or functional impairment.

The issues before the Board on this appeal are:

1. Whether claimant met with personal injury by accident arising out of and in the course of her employment.

2. The nature and extent of claimant's injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working as a certified nurses assistant (CNA) for respondent in May of 2009. Her duties included taking care of patients moving patients from wheelchairs and feeding them. On August 2, 2009, claimant alleges she injured her low back while moving a resident, Bill Strait, from a wheelchair to a recliner. The only witnesses to the incident were claimant and Mr. Strait. Claimant claims she reported the incident to the charge nurse, and the charge nurse directed her to Connie Schott, claimant's supervisor,[4] who directed her to inform the administrator, Sharon Rinke. Ms. Rinke tried to get claimant

---

[1] Award at 2.

[2] Id. at 4.

[3] A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[4] Connie Schott is the director of nursing. (See P.H. Trans. at 22.)

in to see the doctor, but could not get an appointment, so she sent claimant to the local hospital where claimant was diagnosed with back strain and assigned restrictions.[5] Claimant eventually got an appointment with Dr. Alexander in Kingman, Kansas, who ordered x-rays and determined that claimant's problem started with her hip. Dr. Alexander released claimant to return to work on August 18, 2009.

Claimant quit her job in late August 2009 to move to Wichita, Kansas, with her boyfriend, and there she began treating with Dr. Paul C. Pappademos, who ordered an MRI and referred claimant to Dr. Patrick Do. Claimant stated that she quit for personal reasons and not because of her injury. She stated that her reason for quitting had nothing to do with her ability to do the job and that she left for personal reasons. Shortly thereafter, claimant's boyfriend left her, and claimant called respondent in an attempt to get her job back, but was told that despite her giving proper notice before she quit, the administrator would not allow her to come back[6] because of her injury.[7]

Claimant reached maximum medical improvement on April 15, 2010, and Dr. Do indicated claimant has, according to the fourth edition of the AMA *Guides*,[8] a 5% functional impairment to the body as a whole and placed her in DRE Lumbosacral Category II.[9] Dr. Do indicated an MRI of claimant's lumbar spine shows a small disc protrusion at L4-L5. Dr. Do assigned claimant restrictions and based on those restrictions, found claimant had a 57% task loss based on the task list of Dr. Robert Barnett and a 19.5% task loss based on the task list of Karen C. Terrill.

In the Award, ALJ Clark stated:

> This Court finds that Claimant **may** have suffered personal injury by accident arising out of and in the course of her employment on August 2, 2009, but she has not sustained her burden proving she has any kind of permanent partial impairment or functional impairment. The Claimant's request for benefits, including future benefits, is hereby denied. (Emphasis added.)[10]

---

[5] P.H. Trans. at 5-6.

[6] Id. at 8.

[7] Id. at 16.

[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[9] Do Depo., Ex 2.

[10] Award at 4.

The use of the word "may" by the ALJ is unfortunate and confusing, and makes this Board wonder if the ALJ determined claimant met her burden of proof on this issue. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[11] Moreover, it is claimant's burden to prove by a preponderance of the evidence that she suffered a personal injury that arose out of and in the course of her employment. This Board deduces the ALJ found claimant met with personal injury arising out of and in the course of her employment and, therefore, the ALJ intended that past authorized medical expenses were to be paid by respondent.

Whether claimant met with personal injury by accident arising out of and in the course of her employment

Ms. Rinke investigated the accident by interviewing Bill Strait, the resident claimant was assisting when she injured herself. Mr. Strait is of sound mind and is the resident council president. Mr. Strait denied any knowledge of an incident wherein claimant injured herself while assisting him. Ms. Rinke then reviewed the ADL sheet of Mr. Strait for August 2, 2009. The ADL sheet is a detailed list of cares a resident is to receive from the attending CNA. During his or her shift, the CNA is responsible for initialing the appropriate box of the patient's ADL sheet. Respondent introduced the ADL sheet of Mr. Strait for August of 2009. Claimant did not complete the ADL sheet for Mr. Strait on August 2, 2009, the date of accident. On the date of the alleged accident, the ADL sheet of Mr. Strait was signed by a CNA other than claimant.[12]

At the March 25, 2010, preliminary hearing, claimant indicated her back was doing okay with the use of a TENS unit, but sitting for a long time really bothers it and ". . . starts shooting pain down my leg."[13] Respondent introduced photographs dated January 9, 2009,[14] depicting claimant dancing, and cross-examined claimant about the photographs.

Q. (Mr. Entz) Were you participating in the line dancing?

A. (Claimant) For just a brief period of time. I was having a good day.

Q. (Mr. Entz) Did the line dancing make your back worse?

---

[11] K.S.A. 2009 Supp. 44-501(a).

[12] Rinke Depo. at 8-12.

[13] P.H. Trans. at 10.

[14] Id., Resp. Ex. 2.

A. (Claimant) At this point on this date, I didn't know that my back was hurting. I just had the MRI done on the 7th of January.

Q. (Mr. Entz) You didn't know your back was hurting until you had the MRI?

A. (Claimant) I didn't know what was wrong with my back. All along I was under the impression it was my hip because my foot was turning in. Dr. Alexander said it was my hip that was messed up.

Q. (Mr. Entz) How often would you go out to Denim & Diamonds?

A. (Claimant) I haven't been out since that evening.

Q. (Mr. Entz) How often would you go out before that evening?

A. (Claimant) Maybe once, twice a month when I was feeling good.

Q. (Mr. Entz) I think I asked this but I don't know what your answer was. Would the dancing make your back worse?

A. (Claimant) Kind of, sort of. It really hasn't gotten particularly worse since it started in February [2010], is when it started getting worse.[15]

By the July 14, 2010, regular hearing, claimant alleged her physical condition was much worse. Claimant testified that when she had a bad day, she could not get out of bed.[16] On a good day, claimant can get up and make it to the recliner or into the kitchen. Claimant also noted that on a good day, she can walk fifteen minutes without difficulty and stand only ten minutes. If she walks more than fifteen minutes, she gets shooting pains in her legs. She indicated she has numbness and sharp pain into her legs on a daily basis, and that she has difficulty showering, dressing and tying shoes because of bending over. Claimant noted she even cut her hair off because she could not wash it and care for it, implying this was due her back problems.

At regular hearing, respondent again cross-examined claimant about visiting Denim and Diamonds.[17] Claimant indicated she had been to that establishment a few weeks earlier for her sister's birthday, "but all I did was sit."[18] Respondent then entered into evidence a computer disc containing a recording taken of claimant at Denim

---

[15] Id., at 19-20.

[16] R.H. Trans. at 13.

[17] Denim and Diamonds is a nightclub in Wichita. (See P.H. Trans. at 18.)

[18] R.H. Trans. at 26.

and Diamonds on June 26, 2010, and June 27, 2010. Also included on this disc is a recording taken on June 11, 2010. The significant part of the recording begins at 8:45 p.m. on June 26, 2010, and ends at 1:26 a.m. on June 27, 2010.[19] In the recording, claimant dances on several occasions and, as aptly described by the ALJ, "[s]he is dancing and doing extensive bending, twisting, squatting, and other aggressive dance movements."[20] In the June 26 to June 27 recording, claimant has shorter hair than in the photographs depicting her dancing that were introduced at the preliminary hearing. When asked about this by respondent's counsel, claimant again alleged she had to cut her hair off because it was too hard to wash it.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[21] A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[22] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[23]

Claimant's testimony at preliminary hearing and regular hearing is replete with inconsistencies and falsehoods. First, claimant indicated she was injured while moving Mr. Strait, but Mr. Strait told Ms. Rinke nothing unusual occurred on the date of accident. The ADL sheet, which is in essence a log of the care provided to a resident, clearly shows another CNA, not claimant, cared for Mr. Strait on the alleged date of accident.

From August 18, 2009 (when claimant was released to work by Dr. Alexander) until January of 2010, claimant sought no medical treatment for her back. On January 7, 2010, claimant told Dr. Pappademos about pain in the groin, thigh and low back. Despite her pain, claimant was able to go dancing two days later. Claimant's explanation is that she had not undergone the MRI yet and, therefore, did not know she was hurting.

At regular hearing, claimant portended she could not get out of bed four days that week due to her pain and that even on good days she could only walk fifteen minutes and stand ten minutes. Claimant said she went to Denim and Diamonds on her sister's birthday, but only sat. Yet the video recorded three weeks earlier portrays her bending

---

[19] Id., Resp. Ex. 2.

[20] Award at 4.

[21] K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[22] K.S.A. 2009 Supp. 44-501(a).

[23] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

twisting, stooping and gyrating while dancing. The recording clearly shows claimant dancing without visible symptoms of pain and on her feet considerably longer than fifteen minutes.

By stating in the Award claimant "may" have suffered personal injury by accident arising out of and in the course of her employment on August 2, 2009, it appears even the ALJ was not entirely convinced claimant suffered an injury arising out of and in the course of her employment. Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case.[24] This Board finds claimant did not sustain her burden of proving by a preponderance of the evidence she suffered personal injury by accident that arose out of and in the course of her employment.

The nature and extent of claimant's injury

This issue is moot due to the foregoing finding.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[25] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision, and order of the Workers Compensation Board that the November 24, 2010, Award entered by ALJ John D. Clark should be reversed with regard to the finding that claimant met with personal injury by accident arising out of and in the course of her employment. The Board finds that claimant did not sustain her burden of proving by a preponderance of the evidence she suffered personal injury by accident that arose out of and in the course of her employment. This finding renders moot the issue regarding the nature and extent of claimant's injury.

IT IS SO ORDERED.

---

[24] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[25] K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Michael L. Entz, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge